APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 96-41007

DANNY L. RUSSELL,
Plaintiff-Appellant,

v.

PLANO BANK & TRUST,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

Dec. 19, 1997

Before KING and JONES, Circuit Judges, and WERLEIN,* District Judge.

KING, Circuit Judge:

Plaintiff-appellant Danny L. Russell, appeals the district court's judgment, following a jury trial, in favor of defendant-appellee Plano Bank & Trust. Russell claims that the district court's jury instructions contained an incomplete definition of the term "qualified individual with

* District Judge of the Southern District of Texas, sitting by designation.

a disability" within the meaning of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994), which he argues was likely to have misled the jury. He therefore contends that he is entitled to a new trial. We affirm the judgment of the district court.

I. FACTUAL & PROCEDURAL BACKGROUND

Plaintiff-appellant Danny L. Russell was employed by defendant-appellee Plano Bank & Trust ("Plano Bank") from August 15, 1980, until his termination on October 31, 1993. Both parties agree that Russell was a valuable employee who received several promotions during his tenure at Plano Bank. In 1989, Russell received a promotion to the position of Vice-President and Special Asset Department Manager, and it is this position that he held at the time of his termination.

On August 4, 1992, Russell was involved in a motor vehicle accident that caused him to suffer neck, shoulder, and back injuries, as well as a "concussion post-late effect, also known as a brain injury." As a result of the accident, in September 1992 Russell began to experience "complex partial seizures." These seizures caused Russell to experience symptoms which included disorientation, muscle twitching in his extremities, blank staring, sensitivity to sound and light, irritability, and rage. Several weeks after the accident, Russell experienced one of these seizures while at work.

As a result of the seizures, Russell sought medical attention, and he was placed on disability leave while he underwent evaluation and treatment. During the fall of 1992, Russell began a rehabilitation program aimed at preparing him to return to work on a part-time basis. On December 15, 1992, Russell, his wife, and Dr. Richard Fulbright, Russell's treating neuropsychologist, met with Jeff Chase, Plano Bank's Executive Vice-President and Russell's supervisor, to discuss his condition and the possibility of his

return to work. The parties eventually agreed that Russell could return to his job when he was capable of working for at least four hours per day. Russell then enrolled in an intensive rehabilitation program that focused on teaching him job-related skills and allowed him to practice working on Plano Bank's own files.

The rehabilitation program discharged Russell on July 7, 1993, and he claims that as of that date he was ready and cleared by his physicians to return to work for at least four hours per day.[1] On July 10, 1993, Russell, along with his wife and his rehabilitation nurse, met with Chase and another Plano Bank representative. Chase informed Russell that Plano Bank was planning to eliminate the Special Assets Department and that he was therefore unsure whether there was a place for Russell at the bank. On August 5, 1993, Chase confirmed that he had been unable to find a position for Russell, and he offered Russell a severance package conditioned on Russell's signing a release of liability. In August 1993, Plano Bank disbanded Russell's department. Russell refused to sign the release that accompanied the severance package, and on October 26, 1993, he received a termination letter from Plano Bank stating that he was terminated as of October 31, 1993.

On May 19, 1995, Russell filed suit against Plano Bank claiming that it had violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 (1994), by failing to reasonably accommodate him and by ultimately terminating his employment. After a three-day trial, the jury returned a verdict finding that Russell was not a qualified individual with a disability. The district court therefore entered a judgment that Russell take nothing on his claims, and Russell timely appealed.

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[1] Plano Bank disputes this assertion, claiming that Russell's physicians never gave him a full release to return to work and that Plano Bank's policy required such a release before it could allow him to return.

II. DISCUSSION

A. The Jury Instructions

Russell argues that the district court's jury instruction contained an erroneous definition of the term "qualified individual with a disability" within the meaning of the ADA which is likely to have misled the jury. He therefore argues that he is entitled to a new trial. At trial, Russell submitted a proposed jury instruction to the district court which read, in part, as follows:

> The term "qualified individual with a disability," as used in these instructions, means an individual with a disability who can perform the essential functions of the employment position at issue, with or without reasonable accommodation.

The definition that th ecourt ultimately gave to the jury read, in part, as follows:

> The phrase "qualified individual with a disability," as used in these instructions, means an individual with a disability who can perform the essential functions of the employment position which the Plaintiff holds or for which the Plaintiff has applied.

The next page of the instructions contained an explanation of the term "essential functions" which included the following statement:

> If a disabled employee is not able to perform the essential functions of his position, with or without reasonable accommodations, as that term is defined in these instructions, the employee can lawfully be terminated and the employer is not required to assign him to alternative employment.

Two pages later, the jury instructions defined "reasonably accommodate" as follows:

> The term "reasonably accommodate" means any effective modification or adjustment to the workplace

> that makes it possible for a person with a disability to perform the essential function of their employment position or to enjoy the same benefits and privileges of employment that are available to any person without a disability.

The Verdict of the Jury included a total of seven interrogatories. Interrogatory Number 1 read as follows: "Do you find from a preponderance of the evidence that Danny L. Russell was a qualified individual with a disability?" Because the jury responded negatively to this question, they did not reach any of the other interrogatories.

Russell argues that he was prejudiced by the form of the jury instructions because the words "with or without reasonable accommodation" were omitted from the definition of qualified individual with a disability. He contends that in answering Interrogatory Number 1, the jury would tend to focus on the specific definition of qualified individual with a disability and was therefore likely to ignore the discussion of reasonable accommodation which appeared in a later part of the jury instructions. In support of his argument, Russell points to the ADA's own definition of qualified individual with a disability, which reads follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8) (1994). Russell contends that the reasonable accommodation requirement is the "heart and soul" of the ADA and he therefore argues that the district court's failure to mention reasonable accommodation in its definition of qualified individual with a disability created ineradicable doubt as to whether the jury was properly guided in its deliberations.

In response, Plano Bank first argues that because Russell failed to preserve his objection to the jury instructions, this court's consideration of his appeal is limited to plain error review. Second, Plano Bank notes that although Russell cited to § 104A.04 of the treatise *Federal Jury Practice and Instructions* as support for his proffered instruction, the language in that book is exactly the same as the language used by the district court in its definition of qualified individual with a disability. Finally, Plano Bank contends that there was no reasonable accommodation that would have permitted Russell to fulfill the essential functions of his job because (1) the accommodations that Russell requested were not reasonable, and (2) even if the requested accommodations were implemented, Russell was still not qualified for the position he sought due to his mental limitations.

B. Standard of Review

Where a party argues on appeal that the district court erred in refusing to give a proffered jury instruction, that party must "show as a threshold matter that the proposed instruction correctly stated the law." *Federal Deposit Ins. Corp. v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994). As Russell's proffered instruction tracked the language of the ADA, there is no question that it was a correct statement of the law.

Once that threshold is met, we generally apply a two-part test in considering a challenge to the district court's jury instructions. The party challenging the instructions must first "demonstrate that the charge as a whole creates 'substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.'" *Id.* (quoting *Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir.1993)). Second, even where a jury instruction was erroneous, "we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case." *Id.*

Moreover, in determining whether the instruction was erroneous, we accord substantial deference to the decision of the district court. *Id.* at 1319.

A prerequisite to our review of the instructions in this manner, however, is that the objection must have been brought to the attention of the district court at trial. 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2553 (2d ed. 1995) ("In the absence of a properly specific objection under Rule 51 made before the jury retires, a party ordinarily cannot claim on appeal that the trial court erred in the giving of an erroneous instruction or the failure to give a requested instruction." (footnotes omitted)).

In order to raise the issue before the district court in the proper manner, the complaining party must comply with Federal Rule of Civil Procedure 51, which states that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." FED.R.CIV.P. 51. In the instant case, Russell submitted a proposed jury instruction that the district court rejected. A party may not satisfy the requirements of Rule 51 by merely submitting to the court a proposed instruction that differs from the instruction ultimately given to the jury. *See Kelly v. Boeing Petroleum Servs., Inc.*, 61 F.3d 350, 361 (5th Cir.1996). Moreover, "parties are not entitled to have the jury instructed in the precise language or form they suggest." *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 270 (5th Cir.1991).

In addition to submitting his own instructions, however, Russell's attorney objected to the district court's instructions, stating "can we just have an objection that to the extent that the Plaintiff's requested instructions were not given, we would object on that ground." The court responded, "[t]he objections will be overruled. And the Court will state for the record to the extent the re-

quested instructions of the Plaintiff are not substantially covered—given in the Court's charge, they are refused." In addition, Russell's attorney specifically objected to a portion of the instructions dealing with good faith and undue hardship, but he made no specific reference to the omission of the words "with or without reasonable accommodation" from the definition of qualified individual with a disability.

We have repeatedly held that a general objection to the district court's jury instructions is insufficient to satisfy Rule 51. *See, e.g., Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1272 (5th Cir.1989) (finding appellants' objection "to the extent any charge [they] requested was not given by the Court" to be insufficient to "inform the trial court of a perceived problem"); *Tandy Brands, Inc. v. Harper*, 760 F.2d 648, 654 (5th Cir.1985) (finding that appellant's purported objection did "not satisfy Rule 51's requirement that a party state 'distinctly the matter to which he objects and the grounds of his objection' " and was not " 'sufficiently specific to bring into focus the precise nature of the alleged error' " (quoting *Delancey v. Motichek Towing Serv., Inc.*, 427 F.2d 897, 900 (5th Cir.1970))); *Williams v. Hoyt*, 556 F.2d 1336, 1340 (5th Cir.1977) ("The sweeping generalization that the court's charge to the jury was 'fundamentally wrong' and 'not a fair statement of the law' does not require extended discussion. Appellants failed to object to the court's instructions."). Russell's objection was not specific enough to apprise the district court of his particular problem with the challenged instruction, and it therefore failed to satisfy the requirements of Rule 51.

A party may be excused from the requirement of making a specific objection only where "the party's position previously has been made clear to the trial judge and it is plain that a further objection would be unavailing." 9A WRIGHT ET AL., *supra*, § 2553. "Only when the appellate court is sure that the trial court was ade-

quately informed as to a litigant's contentions may the appellate court reverse on the basis of jury instructions to which there was not formal objection." *Industrial Dev. Bd. of the Town of Section, Alabama v. Fuqua Indus., Inc.*, 523 F.2d 1226, 1238 (5th Cir.1975). For example, in *Pierce v. Ramsey Winch Co.*, 753 F.2d 416 (5th Cir. 1985), this court found that the defendant adequately preserved its objections to the jury instruction by making a general objection to the court's failure to include its requested instructions and by including in the record (1) its proposed instructions that the court had rejected and (2) a memorandum setting forth its position regarding its proposed instructions. *Id.* at 424. In that case, the fact that the objecting party's specific disagreements with the jury instructions were included in the record assured us that the trial court was fully aware of the substance of the objections, and we therefore concluded that the purpose of Rule 51 had been served. *See id.* In contrast, in the instant case, there is no evidence in the record that Russell's position regarding the omission of the words "with or without reasonable accommodation" from the paragraph defining qualified individual with a disability was made clear to the trial judge.[2]

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[2] At oral argument and in his Reply Brief, Rusell's attorney claimed that he explained his specific objection to the instruction at issue to the district court in an off-the-record conference. Russell relies on the Seventh Circuit's decision in *Niehus v. Liberio*, 973 P.2d 526 (7th Cir.1992), to support his argument that the objection need not be stated in the record so long as the trial court has been made aware of it. The *Niehus* court noted that

> nothing in the text of Rule 51 requires that the objection be stated on the record; and the main purpose of the rule—to give the judge a chance to correct an error that might require a reversal and new trial—does not require that the objection be recorded.

Id. at 529 (citations omitted).

Russell's reliance on *Niehus* is misplaced. In *Niehus*, the court based its decision, at least in part, on the fact that "[t]he uncon-

Where the party challenging the district court's instructions has failed to raise the objection before the district court and this position has not been made clear to the court in some other manner, our consideration of the issue is limited to plain error review. *Highlands Ins. Co. v. National Union Fire Ins. Co.*, 27 F.3d 1027, 1031-32 (5th Cir.1994). In order for an appellant to prevail under this level of scrutiny he must show: "(1) that an

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tradicted affidavit by the defendants' lawyer . . . establishe[d] that there was no violation of Rule 51." *Id.* at 530. We do not think that a party's failure to make a formal, on-the-record objection or to state clearly the grounds for their objection, as required by Rule 51, may be remedied by the submission of an affidavit stating that the objection was made. Moreover, the holding in *Niehus* conflicts with the settled law of this circuit; we have held that

> [t]he precedure of holding off-the-record charge conferences and failing to reflect what transpired is, we think, in clear violation of the spirit of Fed.R.Civ.P. 51. . . . Obviously, we cannot consider off-the-record objections to jury instructions not subsequently made part of the record. . . .

King v. Ford Motor Co., 597 F.2d 436, 440 n. 3 ((5th Cir.1979). Indeed, this circuit has never approved of off-the-record objections as a method of satisfying the requirements of Rule 51. *Cf. Bolton*, 871 F.2d at 1272 (finding that raising an objection at an informal conference with the trial judge's law clerk was insufficient to preserve the objection where the conference was not on the record); *Burns v. Travelers Ins. Co.*, 344 F.2d 70, 73 (5th Cir. 1965) ("If the proper objection does not appear in the record, then the appellate court need not consider the alleged error."). Finally, we note that we are not alone in our strict application of Rule 51; other circuits enforce the requirement that the specific grounds of the objection be clear from the record. *See, e.g., Dupre v. Fru-Con Eng'g, Inc.*, 112 F.3d 329, 334 (8th Cir.1997) (rejecting *Niehus*'s reasoning and holding that "to preserve an argument concerning a jury instruction for appelalte review, a party must state distinctly the matter objected to and the grounds for the objection on the record"); *Coy v. Simpson Marine Safety Equip., Inc.*, 787 F.2d 19, 25 (1st Cir.1985) (reviewing jury instructions only for plain error where the specific grounds of the objections "were not stated for the record after delivery of the charge to the jury and no transcript of a conference held in chambers prior to the charge is available").

error occurred; (2) that the error was plain, which means clear or obvious; (3) the plain error must affect substantial rights; and (4) not correcting the error would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.' " *Id.* at 1032 (quoting *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 1778-79, 123 L.Ed.2d 508 (1993), and holding that " '[t]he principles and decision enunciated in *Olano* apply a *fortiori* in the civil context.' " (quoting *Smith v. Gulf Oil Co.*, 995 F.2d 638, 646 (6th Cir.1993))).

C. Application of the Plain Error Standard to Russell's Claim

As Russell failed to satisfy the requirements of Rule 51, we review the district court's jury instructions only for plain error. At the outset, Russell must prove that an error occurred. In determining whether a particular jury instruction was erroneous, we consider the jury charge as a whole. *Turnage v. General Elec. Co.*, 953 F.2d 206, 211-12 (5th Cir.1992) ("An inadequate instruction merits reversal when 'the charge as a whole leaves us with the substantial and ineradicable doubt whether the jury has been properly guided in its deliberations' " (quoting *Bommarito v. Penrod Drilling Corp.*, 929 F.2d 186, 189 (5th Cir.1991))); 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, *supra*, § 2558 ("In determining whether the charge is erroneous, the charge must be considered as a whole by the appellate court."). Viewed in their entirety, the jury instructions in this case were not erroneous. Although the words "with or without reasonable accommodation" were omitted from the paragraph about which Russell complains, the jury instructions mentioned reasonable accommodation numerous times. Specifically, the explanation of essential functions included a reference to reasonable accommodation, and the term "reasonably accommodate" was explicitly defined shortly thereafter.

Russell claims, however, that the fact that Interrogatory Number 1 directed the jury to consider only whether Russell was a qualified individual with a disability means that it is likely that the jury failed to consider Plano Bank's duty to reasonably accommodate him because that was not mentioned in the definition of qualified individual with a disability. We disagree. "Juries are presumed to follow the instructions of the court." *United States v. Fletcher,* 121 F.3d 187, 197 (5th Cir.1997) (citing *Zafiro v. United States,* 506 U.S. 523, 540-41, 113 S.Ct. 933, 938-39, 122 L.Ed.2d 317 (1993)). The district court's instructions specifically admonished the jurors that they were "not to single out one instruction alone as stating the law, but must consider the instructions as a whole." Absent any indication that the jury was confused by or failed to follow the district court's instructions, we cannot say that the omission of the words "with or without reasonable accommodation" from the paragraph at issue constituted error.

Even assuming, however, that it was error for the district court to omit the language at issue from the definition, the requirement of plain error are exacting and the plain error exception is a narrow one that applies only where " 'the error is so fundamental as to result in a miscarriage of justice.' " *Johnson v. Helmerich & Payne, Inc.,* 892 F.2d 422, 424 (5th Cir.1990) (quoting *Sandidge v. Salen Offshore Drilling Co.,* 764 F.2d 252, 262 (5th Cir.1985)); *see also* 9A WRIGHT ET AL., *supra,* § 2558 ("If there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case when the error seriously has affected the fairness, integrity, or public reputation of the trial court's proceedings."). Moreover, in considering the requirements of plain error after the Supreme Court's decision in *Olano,* we have stated that

> *Olano*'s requirement of an "obvious" error is stringent. The Court said that "at a minimum" an

> alleged error must be "clear under current law." *United States v. Frady* [456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816], an opinion cited by *Olano*, required error so clear that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." It is the unusual case that will present such an error.

Highlands Ins. Co., 27 F.3d at 1032 (footnotes omitted).

Russell has presented no evidence that the alleged error was "clear under current law." *Id.* In fact, in his own proposed jury instructions Russell cited to the very treatise that contains the pattern jury instruction about which he now complains. *See* 3 HON. EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 104A.04 (4th ed. Supp.1997). Further, this court has found no cases, in this circuit or any other, that criticize the pattern jury instruction used by the district court to define qualified individual with a disability. As a result, we cannot conclude that the district court's error, if any, was clear under current law. Thus, while in retrospect a definition of qualified individual with a disability that included the words "with or without reasonable accommodation" may have been preferable, we cannot say that it was plain error for the district court to fail to include such language in a particular paragraph of a twenty-seven page jury instruction which fully explained reasonable accommodation in later paragraphs and admonished the jury to consider the instructions as a whole is deciding on a verdict.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX B

[Filed Jun. 12, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

4:95cv118

DANNY L. RUSSELL,
Plaintiff,

v.

PLANO BANK & TRUST,
Defendant.

COURT'S INSTRUCTION TO THE JURY

Members of the Jury:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn

duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. The law is no respecter of persons, and a bank and all other persons stand equal before the law and are to be dealt with as equals in a court of justice.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that they believe are most significant or most helpful to their side of the case and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence that I have admitted in the case, you are permitted to draw such reasonable inferences from the testimony and ex-

hibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the evidence in the case.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence—such as the testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. The law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believabiilty" of each witness and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the plaintiff or the defendant? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

You should kee in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and that may depend on whether it has to do with an important fact or with only an unimportant detail.

In making up your mind and reaching a verdict, do not make any decision simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because theer were more witnesses testifying for one side on that point. Your job is to carefully consider the testimony of each witness you have heard and decide how much you believe of what each witness had to say.

The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness.

The testimony of a witness may be discredited or impeached by showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something, or failed to say or do something, which is inconsistent with the testimony the witness gave at this trial.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

During the trial of this case, certain testimony has been shown to you by way of a video deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys

for the parties to this case. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, in so far as possible, in the same way as if the witness had testified from the witness stand.

During the trial you heard the testimony of Dr. Richard Fulbright, who was presented to you as an expert in the field of neuropsychology.

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field—they are called an expert witness—is permitted to state their opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it.

In deciding whether to accept or rely upon the opinion of an expert witness, you may consider any bias of the witness, including any bias you may infer from evidence that the expert witness has been or will be paid for reviewing the case and testifying, or from evidence that he or she testifies regularly as an expert witness and that the expert' income from such testimony represents a significant portion of his income.

The burden is on the Plaintiff in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may

consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence regardless of who may have produced them. If the proof should fail to establish any essential element of Plaintiff's claim by a preponderance of the evidence, the jury should find for the Defendant as to that particular claim. I am now going to give you some additional instructions, as well as the contentions of the parties.

As a result of an automobile accident in August 1992, Plaintiff Danny L. Russell suffered a concussion post-late effect or brain injury. As a result of this injury, Plaintiff began having health problems, including seizures in September 1992. Because of his injuries, Russell ought medical attention and was placed on disability leave from his position as Vice-President at Defendant Plano Bank and Trust while he underwent evaluation and treatment.

Plaintiff contends that in December 1992, his doctors released him to work for one and a half hours per day. Although Defendant's representative, Mr. Jeff Chase, originally agreed to this, after further thought, Plaintiff alleges the Defendant took the position that Russell could come back to work only when he could work a minimum of four hours per day. Accordingly Plaintiff continued his treatment until July 1993.

On July 10, 1993, Plaintiff contends he again met with Mr. Chase and informed him that he had been released to return to work for four hours a day per the Defendant's requirement. Plaintiff contends that Mr. Chase informed him that the Bank was not sure a position remained for him at Plano Bank and Trust. Ultimately Plaintiff was terminated by Defendant in October 1993.

Plaintiff contends that he was terminated in violation of the Americans with Disabilities Act otherwise known as the ADA. Plaintiff further asserts that he was a qualified individual with a disability under the ADA and that

Defendant failed to provide him reasonable accommodation as required by the ADA.

Defendant contends Plaintiff is not a qualified individual with a disability as that term is defined by the ADA. Specifically, Defendant argues that at the time of his termination, Plaintiff could no longer perform the essential functions of his position at the Bank with or without reasonable accommodations. Furthermore, Defendant maintains that providing reasonable accommodation to Plaintiff would have imposed an undue hardship on the Defendant.

Defendant further contends that Plaintiff's former position as head of the problem loan and asset section had been eliminated and that no comparable positions were available for Plaintiff from July 10, 1993, which is the date he claims he was able to return to work for four hours per day, until the time of his termination.

The parties have agreed, or stipulated that:

(1) Defendant is subject to the provisions of the Americans with Disabilities Act.

(2) Plaintiff is 42 years old and resides in Plano, Collin County, Texas. Plaintiff was employed by the Defendant from August 15, 1980, until October 31, 1993. At the time of his termination, Plaintiff was employed in the position of Vice-President.

(3) Russell began his employment at the Bank in August 1980, as a Vice-President. Russell was a valuable employee of the Bank, and received several promotions throughout his tenure at the Bank. Russell received his last promotion in 1989, at which time Russell was promoted to Vice-President and Special Asset Department Manager.

(4) As Special Asset Department Manager from 1989, through the date of Russell's accident in August of 1992,

Russell' duties and responsibilities at the Bank included the following:

a. to establish clear plans of action as to the work-out, collection, recovery and/or exit of each asset identified as a problem;

b. ascertain the history of credit relationships to determine what, if any, potential vulnerabilities may develop that could expose the Bank to future, unknown losses;

c. evaluate collateral securing the problem credits and establish a reasonable value both at market and in liquidation to establish the level of loss, if any, to which the Bank may be exposed;

d. perform complete financial analysis including spread, cash flow, and *pro forma* to determine the physical condition of companies or individuals known as problem credits;

e. prepare and deliver to the President and Senior Lending Officer and Board of Directors of the Bank periodic progress and status reports on the condition of problem assets;

f. serve as a member of the Officer's Loan Committee and an *ex-officio* member of the Director's Loan and Discount Workout Committee;

g. keep abreast of all legal issues surrounding collection activities and work with counsel for the Bank in minimizing the Bank's exposure on problem credits;

h. coordinate the efforts of the Bank with external collection agencies;

i. handle follow-up and recovery efforts on prior judgments, charge-offs, and the like;

j. assist management of the Bank in developing problem loan forecasts;

k. assist the Bank's management of "other real estate owned" in disposing of all "other real estate owned" assets of the Bank;

l. assist the Bank's Senior Lender with training programs that may be of benefit to other lenders in the Bank; and

m. serve as an expert in handling bankruptcy cases housed in the bank.

(5) Russell's position as Special Asset Department Manager from 1989, through the date of his accident in 1992, included the supervision of three (3) Bank employees who reported directly to Russell. Russell was in charge of coordinating the work efforts of these employees, and providing these employees with their annual performance reviews.

(6) Russell's primary objective as Special Asset Manager from 1989, through the date of his accident in 1992, was to reduce the Bank's problem loan portfolio.

(7) For the period between 1989 and 1992, Russell and the Special Asset Department of the Bank were successful in reducing the Bank's problem loan portfolio.

(8) The Bank eliminated the Special Asset Department on or about August 1, 1993.

(9) On or about August 4, 1992, Russell was involved in a motor vehicle accident.

(10) Russell suffered neck, shoulder and back injuries, and a "concussion post-late effect, also known as a brain injury."

(11) Beginning in September of 1992, Russell began experiencing "partial complex seizures" as a result of the accident. The last partial complex seizure which Russell

experienced before he began taking anti-seizure drugs was early 1993. In fact, Russell experienced a seizure in his office at the Bank in September of 1992, a few weeks after the accident.

(12) The symptoms of a partial complex seizure included, without limitation, disorientation, muscle twitching in extremities, blank staring, sensitivity to sound and light, irritability, and rage.

(13) Throughout his treatment for the injuries sustained in the accident, Russell was attended by several medical professionals. The primary medical professionals involved in Russells treatment were John Claude Krusz, Ph.D, M.D. (a neurologist) and Richard L. Fulbright, Ph.D (a neuropsychologist).

(14) Defendant has maintained and does maintain various employment benefit plans, including a comprehensive health insurance plan for full time employees, disability insurance, life insurance, sick leave, and a retirement plan.

(15) On December 15, 1992, Russell, his wife, and his treating neuropsychologist, Dr. Richard Fulbright, met with Jeff Chase, Russell's supervisor and Defendant's Executive Vice-President.

As I previously stated, the facts I just read to you were agreed to by both parties. This means that both sides agree that these are facts in this case. I am instructing you therefore, that you must treat these facts as having been proved.

I will now instruct you on the substantive law specifically applicable to Plaintiff's claims.

It is unlawful for an employer to intentionally discriminate against a qualified individual with a disability because of that person's disabiilty. In this case, Plaintiff claims that the Defendant intentionally discriminated against him because he had a disability. Specifically, Plaintiff contends Defendant is liable under the ADA for

its termination of him and for Defendant's alleged failure to provide reasonable accommodations for Plaintiff's disability.

The Americans with Disabilities Act is an antidiscrimination statute that requires individuals with disabilities be given the same consideration for employment that individuals without disabilities are given. An individual who is qualified for an employment opportunity cannot be denied that opportunity solely because of the fact that he has a disability. I caution you however, that the ADA is not intended to give any advantage to an individual with a disability. The ADA is only intended to provide equality of opportunity for such individuals, not preferential treatment.

Under the ADA, an employee's disability may not enter into his employer's decision to terminate that employee, so long as the employee is otherwise qualified for the position he or she holds. Moreover, an employer has a duty to make a good faith effort to provide reasonable accommodation to known disabilities of its employees who are otherwise qualified for employment, if the reasonable accommodation of that employee's disability will not cause undue hardship to the employer.

In order for Plaintiff Danny L. Russell to establish his claim of intentional discrimination by Defendant Plano Bank & Trust in its decision to terminate him, he has the burden of proving the following essential elements by a preponderance of the evidence that:

> *One:* Danny L. Russell is a qualified individual with a disability as that phrase is defined in these instructions;
>
> *Two:* Defendant Plano Bank & Trust intentionally discriminated against Plaintiff, that is, the fact that Plaintiff Danny L. Russell was a qualified individual with a disability was a motivating factor in the Defendant's decision to terminate the Plaintiff; and

Three: As a direct result of the Defendant's intentional discrimination, the Plaintiff sustained damages.

The term "disability", as used in these instructions, means a physical or mental impairment that substantially limits one of the major actiivties of life, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.

The phase "qualified individual with a disability" as used in these instructions, means an indivdiual with a disability who can perform the essential functions of the employment position which the Plaintiff holds or for which the Plaintiff has applied. You should give consideration to, but are obviously not bound by, the employer's judgment as to what functions of a job are essential.

The phrase "essential functions of the employment position" as used in these instructions, means the basic, fundamental duties of the position the Plaintiff holds or for which the Plaintiff has applied. Essential functions do not include marginal functions of the position. Essential functions do include the ability to work on a regular and consistent basis.

A job function may be considered essential for any of several reasons, including but not limited to the following:

(1) because the reason the position exists is to perform that function;

(2) because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(3) because the function may be highly specialized so that a person is hired for his expertise or ability to perform that particular function.

In determining whether a particular function is essential, you may consider, along with all the other evidence in the case, the employer's judgment as to what is essen-

tial, any written job descriptions prepared by the employer prior to interviewing or bidding for that position, amount of time spent on the job performing that function, consequences of not requiring performance of that function, as well as past or current work experience and skills of employees in that position.

If a disabled employee is not able to perform the essential functions of his position, with or without reasonable accommodations, as that term is defined in these instructions, the employee can lawfully be terminated and the employer is not required to assign him to alternative employment.

To establish disability discrimination in connection with his discharge, Plaintiff has the burden of proving by a preponderance of the evidence that his disability contributed to Defendant's decision to discharge him. Plaintiff need not show that his disability was the only factor on which Defendant acted, but he must prove that his disability was a determining factor in Defendant's motivation.

Plaintiff may satisfy his burden in either of two ways: (1) directly, by persuading you that a discriminatory reason more than likely motivated Defendant, or (2) indirectly, by showing that Defendant's reason for its actions is not credible or believable. Under the indirect method of proof, if Plaintiff succeeds in proving to you that Defendant's stated reason for terminating Plaintiff's employment is not credible or believable you may, but are not required to, infer that Defendant was motivated by discriminatory reasons and intended to discriminate against Plaintiff because of his disability.

Plaintiff is not required to produce direct evidence of Defendant's motive in order to succeed on his case. Discrimination, if it exists, is seldom admitted, but may be inferred from the existence of other facts.

As you will recall, Plaintiff has also brought a claim against the Defendant for allegedly failing to provide rea-

sonable accommodations for his disabilities from July 10, 1993, which is the date he claims he was able to return to work for four hours per day, until the time of his termination on October 31, 1993, in violation of the ADA. In order to recover on his claim of intentional discrimination by a failure to reasonably accommodate, Plaintiff must prove by a preponderance of the evidence that:

> *One:* Plaintiff had a disability as that term has been defined for you in these instructions.
>
> *Two:* Plaintiff was a qualified individual with a disability, as that term has been previously defined for you in these instructions; and
>
> *Three:* Defendant failed to reasonably accommodate Plaintiff's disability.

The term "reasonably accommodate" means any effective modification or adjustment to the workplace that makes it possible for a person with a disability to perform the essential functions of their employment position or to enjoy the same benefits and privileges of employment that are available to any person without a disability. The phrase "essential functions of the employment position" has been defined for you previously in these instructions.

The obligations to provide a reasonable accommodation applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation. Reasonable accommodation may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, and acquisition or modification of equipment or devices. In am instructing you that in determining whether Defendant failed to reasonably accommodate Plaintiff by reassignment to another position, you may consider only those positions that were vacant or that Defendant knew or rea-

sonably could have known would become vacant within a reasonable time.

An accommodation is not a reasonable accommodation if it would cause undue hardship to the employer. I am further instructing you that a reasonable accommodation need not be the best accommodation available, nor must it be the one actually requested by the employee. Although the law requires an employer to make "reasonable accommoations" for qualified individuals with disabilities, the law does not require an employer to make fundamental or substantial modifications of its normal operations to insure every disabled employee the benefits of employment.

The ADA does not require an employer to bear the burden of creating reasonable accommodations without the employee's participation. Rather, the ADA intends for both the employer and employee to engage in a cooperative effort to find and implement reasonable accommodations for the employee's disability. It is the responsibility of the employee with the disability to inform the employer that an accommodation is needed for the emplioyee to be able to perform his essential job functions so as to receive the equal benefits and privileges of employment of nondisabled persons. An employer is not required to provide an accommodation if unaware of the need for any particular accommodation.

The Defendant in this case has asserted as a defense that it has made a good faith effort to reasonably accommodate the alleged disability of the Plaintiff. In order to prove this defense, the Defendant must prove by a preponderance of the evidence that:

> *One:* Plaintiff had informed the Defendant that reasonable accommodations, as defined in these instructions, were needed because of Plaintiff's alleged disability; and

Two: Defendant made a good faith effort, in consultation with the Plaintiff, to identify and make a reasonable accommodation that would provide Plaintiff with an equally effective opportunity at the work place; or

Three: The efforts at the reasonable accommodation would cause an undue hardship on the operation of the Defendant's business.

The term "undue hardship", as used in these instructions, means action requiring Defendant to incur significant expense or undergo significant difficulty when considered in light of the following:

One, the nature and net cost of the accommodation;

Two, the overall financial resources of the Defendant and the number of persons employed by the Defendant; and

Three, the type of the Defendant's business, including the composition, structure, and functions of the Defendant's workforce.

In the event you are convinced by the evidence that the Plaintiff has proven his claim by a preponderance of the evidence, then you must determine the amount of damages to which the Plaintiff is entitled.

Of course, the fact that I am giving you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe that the Plaintiff should, or should not, prevail in this case. It is your task first to decide whether the Defendant is liable. I am instructing you on damages only so that you will have guidance in the event you decide that the Defendant is liable and that the Plaintiff is entitled to recover money from the Defendant.

If you find that the Defendant is liable to the Plaintiff, the Plaintiff is entitled to recover an amount which will reasonably compensate him for the loss and damage he has suffered as a result of the Defendant's conduct. Conduct by a defendant that does not cause harm does not entitle a plaintiff to damages. By the same token, harm to a plaintiff which is not the result of conduct by a defendant does not entitle a plaintiff to damages either.

If you find that Defendant intentionally discriminated against Plaintiff because of his disability either by terminating him or by failing to reasonably accommodate his disability, then you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the damages experienced by Plaintiff, no more and no less. Damages must not be based on speculation because it is only actual damages—what the law calls compensatory damages—that are recoverable. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize the Defendant. Compensatory damages, however, are not limited to expenses that the Plaintiff may have incurred for his injuries.

You may award as actual damages an amount that reasonably compensates the Plaintiff for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that the Plaintiff would have received had he not been discriminated against. Basically, you have the ability to make the Plaintiff whole for any wages or other benefits that he has lost as a result of Defendant's employment decisions.

To the extent you find them, you should also calculate separately, as future damages, a monetary amount equal to the present value of wages and benefits that the Plaintiff would have earned had he not been discriminated

against or terminated for that period from the date of your verdict until the date when the Plaintiff would have voluntarily resigned or obtained other employment.

An award of future damages necessarily requires that payment be made now for a loss that the Plaintiff will not actually suffer until some future date. If you should find that the Plaintiff is entitled to future damages, including future earnings and benefits, then you must determine the present worth in dollars of such future damages .

If you award damages for future earnings and benefits, you must consider two particular factors:

1. You should reduce any award by the amount of the expenses that the Plaintiff would have incurred in obtaining those earnings or benefits.

2. If you make an award for future loss of earnings or benefits, you must reduce it to present value by considering the interest that the Plaintiff could earn on the amount of the award if he made a relatively risk-free investment. The reason why you must make this reduction is because an award of an amount representing future loss of earnings and benefits is more valuable to the Plaintiff if he receives it today than if he received it in the future, when he would have otherwise earned it. It is more valuable because the Plaintiff can earn interest on it for the period of time between the date of the award and the date he would have earned the money or benefit. Thus, you should adjust the amount of any award for future loss of earnings or benefits by the amount of interest that the Plaintiff can earn on that amount in the future.

The Plaintiff alleges that as a result of the Defendant's conduct, he has suffered mental anguish. If the Plaintiff prevails on his claim, he is entitled to compensatory damages for any such damages he has suffered because of the

Defendant's conduct. "Mental Anguish" means the emotional pain, torment, and suffering experienced by the Plaintiff because of the Defendant's alleged wrongful conduct.

No evidence of the value of intangible things such as mental anguish need be introduced. You are not trying to determine value, but an amount that will fairly compensate the Plaintiff for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded for this element of damages. Any award that you make should be fair in the light of the evidence.

When considering the amount of monetary damages to which the Plaintiff may be entitled, you should consider the nature, character, and seriousness of any mental anguish, the Plaintiff felt. You must also consider its extent or duration, as any award you make must cover the damages endured by the Plaintiff since the wrongdoing, to the present time, and even into the future if you find that the proofs presented justify the conclusion that the Plaintiff's emotional stress and its consequences have continued to the present time or can reasonably be expected to continue into the ftuture. However, should you find that Plaintiff is entitled to damages for future mental anguish, you must not make any adjustment to present value for such damages.

I am cautioning you, that you must not award compensatory damages more than once for the same injury. For example, if the Plaintiff prevails on two claims and establishes a dollar amount for his injuries, you must not award him any additional compensatory damages on each claim. The Plaintiff is entitled to be made whole once, and may not recover more than he has lost. Of course, if different injuries are attributed to different claims, then you must compensate the plaintiff fully for all of his injuries he has proven by a preponderance of the evidence.

The Plaintiff must make every reasonable effort to minimize or reduce his damages for loss of compensation by seeking employment. This is called mitigation of damages.

If you determine that the Plaintiff is entitled to damages, you must reduce these damages by (1) what the Plaintiff earned and (2) what the Plaintiff could have earned by reasonable effort during the period from his discharge until the date of trial.

You must decide whether the Plaintiff was reasonable in not seeking or accepting a particular job. However, the Plaintiff must accept employment that is "of like nature." In determining whether employment is "of like nature," you may consider

(1) the type of work,

(2) the hours worked,

(3) the compensation,

(4) the job security,

(5) the working conditions, and

(6) other conditions of employment.

The Defendant must prove that the Plaintiff failed to mitigate his damages for loss of compensation.

If you determine that the Plaintiff did not make reasonable efforts to obtain another similar job, you must decide whetther any damages resulted from his failure to do so. You must not compensate the Plaintiff for any portion of his damages that resulted from his failure to make reasonable efforts to reduce his damages.

If you find that the Plaintiff is entitled to damages, you must reduce these damages by (1) any amount the Plaintiff earned; (2) what the Plaintiff could have earned by reasonable effort during the period from his discharge to the date of trial; and (3) any monies Plaintiff has already received as compensation for his damages.

I remind you that it is the Defendant's burden to prove that the Plaintiff faled to mitigate his damages for loss of compensation, or that Plaintiff has already received monies as compensation for his damages.

In addition to the claims for damages already mentioned, you should consider whether the Plaintiff is entitled to punitive damages. These are awarded in exceptional cases as a punishment of the Defendant and as a warning to others to keep them from following the Defendant's example.

You may award these damages if you determine by a preponderance of the evidence that one or more of the Defendant's acts were done with either:

(1) actual malice, which is nothing more or less than intentional wrongdoing—an evil-minded act, or

(2) a wanton and willful disregard for the rights of another—in other words, a deliberate act with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of the Act.

The Plaintiff has produced what he considers evidence of the Defendant's evil-minded intent or wanton and willful disregard for the Plaintiff's rights because of his alleged disability. You may find that one, all, or none of these examples indicate the Defendant's evil-minded intent toward the Plaintiff. Again, it is for you to determine the credibility, relevance, and significance of each piece of evidence and whether it supports the Plaintiff's contention that punitive damages should be awarded.

If you determine that the facts justify an award of punitive damages, you should try to determine a fair, just, and reasonable amount for the Plaintiff under all circumstances. Punitive damages are not intended to compensate a Plaintiff for injuries, but rather to punish the Defendant and to prevent similar conduct in the future.

Thus, if you award punitive damages, you may consider the Defendant's net worth and the impact of its paying that award.

I am instructing you that any award of punitive damages you might choose to make must bear a reasonable relationship to the Plaintiff's actual injury. However, no single numerical equation has been made to easily link punitive damages to compensatory damages. In determining a reasonable relationship to Plaintiff's actual injuries, you must consider all relevant factors, including: (1) the impact or severity of the Defendant's conduct; (2) the amount of time the Defendant conducted itself in this manner; (3) the amount of compensatory damages; (4) the potential profits the Defendant may have made from the alleged wrongful conduct; (5) the attitudes and actions of the Defendant's top management after the alleged misconduct was discovered; (6) the effect of the damages award on the Defendant's financial condition, and (7) any punishment the Defendant may receive from other sources.

If you do award punitive damages, you should fix the amount using calm discretion and sound reason. You must not be influenced by sympathy or dislike of any party in the case.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous.

But do not surrender your honest conviction as to the weight or effect of all of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

As I instructed you when this case began, you have been permitted to take notes during the course of the trial. I will remind you that any notes that you have taken during this trial are only aids to your memory. If your memory differs from your notes, you should rely on your memory and not on the notes. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection of the evidence and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

Remember at all times you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

You have heard all of the evidence in the case and you have heard the argument of counsel. The Court has given you the charge in this case. You will remember that at the beginning of the trial, the Court admonished you not to discuss the case with each other until it was submitted to you. Now is the time for you to begin your discussion, and you certainly may express an opinion from the evidence that you have heard and use any reasonable means to persuade other members of the jury to your convictions and to your honest opinion. You are to reach a verdict which speaks the truth, and which does justice to all parties without favor, bias or prejudice in any particular, either for or against any party to this lawsuit.

Upon retiring to the jury room you should first select one of your number to act as your foreperson who will preside over your deliberations and speak for you here in

Court. A form of verdict has been prepared for your convenience.

Your verdict will be in the form of Interrogatories for you to answer. You will take these Interrogatoies to the jury room, and when you have reached a unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the form and then advise the Security Officer that you have reached a verdict.

During your deliberations you may have any of the exhibits which have been admitted into evidence, and the Court will send them to you upon written request. If you desire further instructions, your foreperson may make this known in writing, and the Court will try to comply with your wishes.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreperson and pass the note to the Security Officer, who will bring it to my attention. I caution you, however, that if and when you communicate with the Court during your deliberations, that you should never state or specify your numerical division at the time.

The Clerk will now hand the Interrogatories to the Security Officer, and you will follow him to the jury room, and begin your deliberations.

As soon as you have reached a verdict you will let this fact be known to the officer who will be waiting upon you and he will report to the Court.

APPENDIX C

[Filed Jun. 12, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

No. 4:95cv118

DANNY L. RUSSELL

v.

PLANO BANK & TRUST

VERDICT OF THE JURY

Your verdict will consist of answers to the following questions.

INTERROGATORY NO. 1

Do you find from a preponderance of the evidence that Danny L. Russell was a qualified individual with a disability?

We do not.

(Answer "We do" or "We do not.")

If you have answered "We do" to Interrogatory No. 1, then proceed to Interrogatory No. 2. If you answered "We do not," proceed no further.

INTERROGATORY NO. 2

Do you find from a preponderance of the evidence that Plano Bank & Trust intentionally discriminated against Danny L. Russell in its decision to terminate his

employment and that plaintiff suffered damages as a result of the Bank's discriminatory conduct?

_____

(Answer "We do" or "We do not.")

Proceed to Interrogatory No. 3.

INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that Plano Bank & Trust was required to provide reasonable accommodations for Danny L. Russell's disability and that it failed to do so?

_____

(Answer "We do" or "We do not.")

If you have answered "We do" to Interrogatory No. 3, then proceed to Interrogatory No. 4. If you answered "We do not," to Interrogatoy No. 3 and "We do" to Interrogatoy No. 2, proceed to Interrogatory No. 5. Otherwise, proceed no further.

INTERROGATORY NO. 4

Do you find from a preponderance of the evidence that Plano Bank & Trust made a good-faith effort to reasonably accommodate Danny L. Russell's disability or that to have done so would have imposed upon Plano Bank & Trust an undue hardship?

_____

(Answer "We do" or "We do not.")

If you answered "We Do" to Interrogatory No. 2, proceed to Interrogatory No. 5. If you answered "We Do" to Interrogatory No. 3 and "We Do Not" as to Interrogatory No. 4, proceed to Interrogatory No. 5. If you answered "We Do Not" to Interrogatoy Nos. 2 and 3, proceed no further. If you answered "We Do Not" to Interrogatory No. 2 and answered "We Do" as to Interrogatory Nos. 3 & 4, proceed no further.

INTERROGATORY NO. 5

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Danny L. Russell for his injuries resulting from the defendant's conduct in question?

You are to consider the element of damages listed below and none other. Do not include interest on any amount of damages that you find.

Answer in dolars and cents.

Past earnings and benefits $_____

Future earnings and benefits $_____

Past and future mental anguish $_____

Proceed to Interrogatory No. 6.

INTERROGATORY NO. 6

Do you find from a preponderance of the evidence that Plano Bank & Trust violated Danny L. Russell's rights under the Americans with Disabilities Act with actual malice or with reckless indifference?

_____

(Answer "We do" or "We do not.")

If you answered "We do" to Interrogatoy No. 6, then proceed to Interrogatory No. 7. If you answered "We do not," proceed no further.

INTERROGATORY NO. 7

What sum of money, if any, should be awarded as punitive damages against Plano Bank & Trust as a result of the actions complained of in this case?

Answere in dollars and cents.

$_____

Date: 6-12-96

/s/ Robert M. Powell
Foreperson

APPENDIX D

[Filed Aug. 23, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

No. 4:95cv118

DANNY L. RUSSELL

v.

PLANO BANK & TRUST

AMENDED FINAL JUDGMENT

This action came on for trial before the Court and a jury, the undersigned presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits and the defendant, Plano Bank & Trust, recover of the plaintiff its costs of action.

This Amended Final Judgment supersedes the Final Judgment entered herein on July 8, 1996.

Signed this 23rd day of August, 1996.

/s/ Paul Brown
United States District Judge